point concerned either by way of cross-examination of D2's experts or by adducing evidence in rebuttal in the shape of expert testimony yet advantage was not taken of that opportunity. To have granted the request of Counsel for the plaintiff would have led to an unnecessary prolongation of what was already a lengthy trial with a consequent increase in costs and would have meant giving the plaintiff a second opportunity to prove a point which it had failed to do at the trial.

Furthermore, if the plaintiff was to be permitted to make further investigations and to call further evidence after the Court has pronounced judgment on **all** issues before it, then the rules of procedure would become nugatory.

Accordingly, having considered the submissions of Counsel on both sides and the various factors abovestated, I had, in the exercise of my discretion, refused to accede to the request of leading Counsel for the plaintiff.

Reported By Karen Lim

TEOH KEAT SENG

v.

JAMALUDIN BIN ABDUL MAJID

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC.
[CIVIL APPEAL NO. 12-12-92 (92)]
31 MAY 1993

TORT: Road accident - Vehicles travelling in opposite directions - Crucial issue was on which side of road the collision occurred - Whether any encroachment - Defendant admitted that he failed to take evasive action and collided into plaintiff's motor cycle on plaintiff's side of road - Whether trial Court could rely on sketch plan and apply doctrine of res ipsa loquitur and hold defendant encroached into path of plaintiff - Whether trial Court in error in concluding that plaintiff was not negligent - Trial Court based its decision on comparative reliability of parties in witness box - Whether it is open to appellate Court to interfere with that decision.

This was an appeal by the defendant against the decision of the Sessions Court, Kuala Kangsar which found the defendant totally liable to the plaintiff's claim in respect of an accident which occurred on 14 June 1989 whereby both the vehicles were travelling in opposite directions.

Held:

[1] The trial Court had correctly evaluated the evidence before it and came to a correct decision according to law.

[2] In this appeal, since the trial Court based its decision on the opinion which it formed as to the comparative reliability of the parties in the witness box, it is not open to this Court to interfere with that decision.

[Appeal dismissed with costs].

Cases referred to:

K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***
Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd. [1980] 2 MLJ 182 ***(refd)***
Mohamed Salleh bin Awang & Anor. v. Low Han Leong & Anor. [1982] 1 MLJ 82 FC ***(refd)***
Multar v. Lim Kim Chet & Anor. [1982] CLJ 107 / [1982] 1 MLJ 184, 185 ***(refd)***
Lloyde v. West Midlands Gas Board [1971] 2 All ER 1240 ***(refd)***
Public Prosecutor v. Tay Bee Seng [1993] 1 CLJ 526 ***(refd)***
Govinda Raju & Anor. v. Laws [1966] 1 MLJ 188 ***(refd)***
Thomas v. Thomas [1947] AC 487 ***(refd)***

Hontestroom (S.S.) v. Durham Castle (S.S.) [1927] AC 37 ***(refd)***
Murugan v. Lew Chu Cheong [1980] 2 MLJ 139 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91 & 92

For the appellant - Khoon; M/s. Chong & Poh
For the respondent - Kula Segaran; M/s. Kula & Associates

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
This is an appeal by the appellant/defendant against the decision of the learned Judge, Sessions Court, Kuala Kangsar ("the trial Court") whereby liability was placed totally at the door of the appellant/defendant and judgment in the respondent/plaintiff's favour was given by the trial Court on 29 February 1992. Following accepted practice, the trial Court assessed general damages at RM 33,000 and awarded 8% interest per annum from the date of service of the summons till the date of settlement. The trial Court also awarded the sum of RM 1,176.20 as agreed special damages and awarded 4% interest thereon from the date of the accident (14 June 1989) to the date of the judgment (29 February 1992).

The appellant/defendant has appealed against the trial Court's finding on liability. It is quite apparent that the substantial question raised by the appeal is whether the appellate Court was entitled to reverse the finding as to liability arrived at by the trial Court.

The action arose out of a collision between the appellant/defendant's motorcar and the respondent/plaintiff's motorcycle on Kuala Kangsar/Taiping road at about 11.00 a.m. on 14 June 1989, as the result of which the respondent/plaintiff sustained personal injuries, of which the most important were lacerated wound of the scalp and the fracture of the lower 1/3 right tibia and fibula. The respondent/plaintiff was riding his motorcycle towards Taiping, the appellant/defendant driving the motorcar in the opposite direction. The crucial issue in this appeal was on which side of the road the collision occurred, the trial Court in a careful judgment held that the appellant/defendant encroached into the lane of respondent/plaintiff and thereby collided into him (respondent/plaintiff) with the appellant/defendant's motorcar finally laid to rest on the respondent/plaintiff's side of the road.

It would not be out of place to note at the outset how the parties had before the trial presented their respective cases in their pleadings. In the statement of claim, it was asserted, *inter alia*, that the appellant/defendant:

(1) memandu dalam keadaan laju;
(2) memandu dengan cuai dan gagal untuk memberi sebarang isyarat atau amaran akan kedatangannya;
(3) gagal untuk memberhentikan, mengelak, memperlahankan atau sebaliknya kenderaan tersebut untuk mengelakkan perlanggaran itu;
(4) tiba tiba masuk jalan plaintif yang sah dan juga tidak menggunakan apa-apa tanda isyarat atau tanda isyarat yang cukup hendak membelok;
(5) plaintif seterusnya bergantung kepada maxim *res ipsa loquitur*.

On the other hand, the appellant/defendant averred in his statement of defence, *inter alia:*

(1) selanjutnya atau sebagai alternatif defendan berkata kemalangan tersebut berpunca daripada kecuaian plaintif.
(2) defendan berkata bahawa permohonan doktrine *res ipsa loquitur* tidak ada dalam perkara ini dan plaintif dikehendaki membuktikannya.

See the value of pleadings in *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10 and *Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.* [1980] 2 MLJ 182.

Now, at the trial the respondent/plaintiff testified that he was riding his motorcycle on his side of the road towards Taiping intending to go back to his house at Lubuk Merbau. He saw at about 30 feet away a motorcar coming from the opposite direction encroaching into his path and was coming towards him. On seeing this, the respondent/plaintiff applied his brakes and swerved to the right (still within his lane) because on his left there were stones and a high wall. The collision that followed was unavoidable as the motorcar came at a fast speed and the distance between them was too near. Under cross-examination, the respondent/plaintiff admitted that at the time of the accident he was not in possession of a driving licence and he maintained that the motorcar encroached into his path and he took evasive action. He denied the suggestion by Counsel for the appellant/defendant that he was crossing the road on his motorcycle from the right-side to the left-side towards Taiping (from the kubur cina Hokkien

road as per the agreed sketch plan). He was insistent that he did not cross the road on his motorcycle from any direction whatsoever. He added that he was travelling at 20 kilometres per hour but the motorcar was speeding and there was no vehicle in front of his lane.

The appellant/defendant testified that he drove his motorcar from the direction of Taiping to Kuala Kangsar with a friend by the name of Hing Hui Nai (a lady colleague according to the police report). Near the Chinese cemetery area, he saw a motorcycle in the opposite direction travelling on the middle of the road in its lane in a slanting position. The front portion of the motorcycle was facing towards him in the direction of the Chinese cemetery. At that time the motorcycle was about 30 feet from him and according to the appellant/defendant there was a bicycle in front of him towards the left. **The appellant/defendant admitted that he failed to take evasive action and had collided into the motorcyclist on the motorcyclist's side of the road.** He stated that he was travelling between 50 to 60 kilometres per hour. Under cross-examination, the appellant/defendant was hesitant in replying and this prompted the trial Court to comment adversely against him. Nevertheless he denied overtaking another vehicle before the collision and stated that he travelled not more than 50 to 60 kilometres per hour. To a question by the trial Court, the appellant/defendant stated that when he first saw the motorcycle, it was in a slanting position. He stated that he had collided into the rear of the motorcycle in the motorcyclist's side of the road.

As I stated earlier, the grounds raised before me are primarily questions of fact. They were very carefully considered by the trial Court. It is also evident that the trial Court scrutinized the testimony of both parties and paid special attention to the silent evidence, in particular the sketch plan. The trial Court was entitled and justified in relying on the sketch plan from which it can draw inferences as to who is liable (*Mohamed Salleh bin Awang & Anor. v. Low Han Leong & Anor.* [1982] 1 MLJ 82 FC). From the sketch plan, the trial Court rightly concluded that the accident occurred on the respondent/plaintiff's side of the road. At point 'L' in the sketch plan, the trial Court concluded that that was the probable point of impact. In my opinion, the inferences drawn by the trial Court were eminently reasonable and probable.

The trial Court further considered the police report lodged by the appellant/defendant and emphasised that the report was at variance with the testimony of the appellant/defendant. Consequently, the trial Court rejected the appellant/defendant's version. The trial Court was entitled to adopt this line of reasoning (see *Multar v. Lim Kim Chet & Anor.* [1982] 1 MLJ 184, 185).

The trial Court further relied on the sketch plan and applied the doctrine of *res ipsa loquitur* in holding that the appellant/defendant had encroached into the path of the respondent/plaintiff and collided into him. The principle of *res ipsa loquitur* was restated admirably by Megaw LJ. in *Lloyde v. West Midlands Gas Board* [1971] 2 All ER 1240 at 1246 in the following words:

> I doubt whether it is right to describe *res ipsa loquitur* as a doctrine. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where:
>
> (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but
> (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitute a failure to take proper care for the plaintiff's safety.
>
> I have used the words "evidence as it stands at the relevant time". I think this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would, the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, *res ipsa loquitur*. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The *res*, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted.

It was the submission of Counsel for the appellant/defendant that the *res ipsa loquitur* doctrine had been rebutted by the evidence of the appellant/defendant to the effect that in front of him on the left there was a bicycle thereby causing him to encroach into the respondent/plaintiff's side and collide into him. However, this piece of evidence was not borne out by his police report. Furthermore what was said orally by the appellant/defendant that run counter to the police report would attract the provisions of ss. 91 and 92 of the Evidence Act 1950 and in the circumstances be considered as an afterthought and an embellishment (see *Public Prosecutor v. Tay Bee Seng* [1993] 1 CLJ 526).

Can it be said that on the totality of the evidence and in view of the findings of fact by the trial Court, the *res*, which had spoken loud and clear of the case for the respondent/plaintiff, had been silenced or in any way become nullified or muted. On appraisal of the available evidence, the appellant/defendant had not succeeded in doing so, and the respondent/plaintiff must therefore succeed.

Much fuss was made by Counsel for the appellant/defendant that the motorcyclist had no licence at the material time. This point is inconsequential as the issue in this appeal is a simple one -was the trial Court in error in concluding that the respondent/plaintiff was not negligent? From the analysis of the available evidence, the answer is obvious. The trial Court had correctly evaluated the evidence before it and came to a correct decision according to law. When the respondent/plaintiff saw the motorcar encroaching and entering into his path, he was like the plaintiff in *Govinda Raju & Anor. v. Laws* [1966] 1 MLJ 188 "perplexed or agitated when exposed to danger by the wrongful act of a defendant."

Now, since the trial Court based its decision on the opinion which it formed as to the comparative reliability of the parties in the witness box, it is not open to this Court to interfere with that decision.

In this connection, I need to quote the judgment of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 487 as follows:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reasons of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion.

Of equal force in the case of *Hontestroom (S.S.) v. Durham Castle (S.S.)* [1927] AC 37 where Lord Summer at p. 47 had this to say:

> What then is the real effect on the hearing in a Court of Appeal of the fact that the trial Judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. Nonetheless, not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

Nearer home is the case of *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139 FC where Abdul Hamid FJ. (as he then was and now the Lord President) said:

> In so far as it concerns this appeal it is abundantly clear that the learned trial Judge had made a thorough and complete analysis of all the material evidence available before he made specific findings of fact and we are satisfied that he drew proper inferences of fact and had made appropriate assessment of the witnesses's credibility. The appellant has failed, in our view, to establish that there was any error of fact or law or that there was a misdirection of himself by the Judge to warrant a revision of his decision.

Accordingly, I would dismiss this appeal with costs.